Supreme Court, U.S.
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88-64

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment prohibits an award of attorneys' fees against a State based on current hourly rates which include interest and a delay in payment factor.

2. Whether total liability for attorneys' fees can be assessed against one co-defendant where liability on the merits has been ordered to be shared equally between two defendants.

3. Whether *Hensley v. Eckerhart*, 461 U.S. 424 (1983) requires that the expenses of a prevailing party be reduced in proportion to the reduction in attorneys' fees under 42 U.S.C. § 1988.

4. Whether paralegal and law clerk expenses awarded under 42 U.S.C. § 1988 must be assessed at actual costs rather than market rates.

5. Whether the court below erred in awarding fees for unsuccessful claims against prevailing defendants and then failing to reduce the fee award, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to reflect plaintiffs' partial success as compared to the scope of the litigation as a whole.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellants/cross-appellees
(now petitioners):

The State of Missouri

The Honorable John Ashcroft, Governor of the State of Missouri

The Honorable Wendell Bailey, Treasurer of the State of Missouri

Dr. Robert E. Bartman, The Commissioner of Education of the State of Missouri

The Missouri State Board of Education: Roseann Bentley, Dan L. Blackwell, Terry A. Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McAllister, Jr., Cynthia B. Thompson and Roger L. Tolliver

Appellees/cross appellants
(now respondents):

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antonia Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Shelia Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Winters, by her next friend, David Winters, on behalf of themselves and all others similarly situated

Appellants/cross-appellees below
(now respondents):

The School District of Kansas City, Missouri, and Claude Perkins, then-superintendent

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OPINIONS BELOW

The opinion of the court of appeals is reported at 838 F.2d 260. The opinion is reprinted as Appendix B in the separate appendix to this petition. The opinions of the District Court are unreported but are reprinted as Appendices C and D of the separate appendix.

JURISDICTION

The State of Missouri, and certain of its agencies and officials, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and § 1343(3) and (4).

The opinion of the court of appeals was entered on January 29, 1988. Rehearing en banc was denied on April 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant Constitutional provision involved in this case is the Eleventh Amendment which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATEMENT OF THE CASE

This petition arises from a decision of the Eighth Circuit Court of Appeals affirming in all respects an order of the District Court for the Western District of Missouri. This order granted almost completely a motion by plaintiff class for attorneys' fees and costs under 42 U.S.C. § 1988. The litigation arose out of a desegregation suit brought by the plaintiff class in 1977. This litigation went on over a period of several years, and is currently in the remedial stage. After the Eighth Circuit rendered its en banc opinion in this cause on December 5, 1986, *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), plaintiffs, among others, filed motions for attorneys' fees and expenses under 42 U.S.C. § 1988. The district court granted compensation for all but 3.5 hours requested by the attorneys for the plaintiff class. The plaintiff class has been represented by the law firm of Benson & McKay from 1979 to the present and concurrently by the NAACP Legal Defense Fund since 1982. In its affirmance of the District Court's order of May 11, 1987, the Court of Appeals required the plaintiffs to be compensated at current rather than historical rates for the services of their counsel. The rates were based in part on a prejudgment interest factor and a delay in payment factor.

Both the District Court and the Court of Appeals imposed liability for the attorneys' fees solely on the State of Missouri rather than splitting them with the State's co-defendant, the Kansas City, Missouri School District. Liability for fees was placed solely upon the State despite the fact that the Kansas City, Missouri School District was ordered to pay 50% of the costs of

remedying the past constitutional violation which gave rise to the lawsuit in the first place.

Plaintiffs were also compensated under 42 U.S.C. § 1988 for the services of law clerks and paralegals hired specifically to work on this case at what the court below found to be market rates, rather than at actual costs.

Further, neither the District Court or the Court of Appeals reduced plaintiffs' expenses. Plaintiffs had made reductions in their attorneys' fees requests totalling approximately 15% (which both the District Court and Court of Appeals found sufficient) but did not reduce their overall expenses by the same percentage (or indeed, any percentage).

Finally, despite plaintiffs' failure to prevail on most of the issues involved in the litigation, the District Court and the Court of Appeals refused to reduce plaintiffs' fee requests beyond plaintiffs' minimal voluntary reductions.

Petitioners request this Court to review all of the decisions on these issues.

The District Court's order was issued on May 11, 1987 (and amended on July 14, 1987). The opinion of the Eighth Circuit was issued on January 29, 1988. The State filed a timely petition for rehearing en banc, which was denied by the Eighth Circuit on April 13, 1988.

REASONS FOR GRANTING THE WRIT

A. The Holding of the Eighth Circuit That Attorneys' Fees Under 42 U.S.C. § 1988 Can Be Awarded Against a State at Current Rather Than Historic Rates Without Regard to a State's Eleventh Amendment Immunity From Pre-Judgment Interest Is Contrary to a Previous Decision of This Court and Is in Conflict With a Decision of the First Circuit.

By allowing an award of attorneys' fees under 42 U.S.C. § 1988 against a state at current rather than historic rates, the Eighth Circuit reached a result inconsistent with this Court's holding in *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986) and in conflict with the First Circuit's holding in *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987).[1]

Petitioners respectfully submit that this Court's holding in *Shaw* raises a serious question as to the correctness of the Eighth Circuit's holding. In *Shaw* the district court increased the adjusted lodestar in an attorneys' fees calculation by 30% to compensate counsel for delay in payment. *Id.*, 106 S.Ct. at 2960. This Court held that

1. The cases cited by the Court below from outside the First and Eighth Circuits to support compensation for delay in payment are inapposite, either because a state was not involved, or the Eleventh Amendment issue was not raised. See *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986) (county involved, not State); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985) (State not involved); *Jordan v. Multnomah County*, 815 F.2d 1258 (9th Cir. 1987) (State not involved); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (State involved; no discussion of Eleventh Amendment); *Lightfoot v. Walker*, 826 F.2d 516 (7th Cir. 1987) (State involved; no discussion of Eleventh Amendment issue).

the no-interest rule, an element of sovereign immunity, prohibited the award of compensation for delay:

> Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds even when characterized as compensation for delay.

Id., 106 S.Ct. at 2965 (quoted in *Rogers*, 821 F.2d at 26).

Similarly, states have a traditional Eleventh Amendment immunity from prejudgment interest because it is prohibited retroactive relief. Since interest and a delay factor share an identical function under *Shaw*, there is every reason the *Shaw* rationale should apply in the Eleventh Amendment context.

The First Circuit recognized the preceding principle in reaching a result directly contrary to that reached by the Eighth Circuit in the opinion from which review is sought.[2] The First Circuit in *Rogers* held that *Shaw* was applicable in the Eleventh Amendment setting, so that any attorneys' fees award under 42 U.S.C. § 1988 assessed against a State had to be made at historic rather than current rates. *Rogers*, 821 F.2d at 28. The First Circuit noted:

2. The Eighth Circuit noted the conflict:

> We cannot agree with the *Rogers* court that the holding in *Shaw* is applicable in a case involving Eleventh Amendment, rather than federal sovereign immunity . . . *Rogers* assumes that compensation for delay equates with prejudgment interest, and we are not satisfied that it does. *Jenkins*, 838 F.2d at 265.

> Congress has not yet made any statement suggesting that a § 1988 attorney's fees award should include prejudgment interest. Indeed, as recently as 1986 the Court in *Library of Congress* [*v. Shaw*] reiterated that "Prejudgment interest . . . is considered as damages, not a component of 'costs' . . . A Statute allowing costs, and within that category, attorney's fees, does not provide a clear affirmative intent of Congress to waive the sovereign's immunity." 106 S.Ct. at 2965.

Rogers, 821 F.2d at 27.

The legislative history of 42 U.S.C. § 1988 is also silent on the subject of prejudgment interest. See *Rogers*, 821 F.2d at 27. The legislative history of the fee shifting statute does however, make reference to the possibility of an award of counsel fees *pendente lite* in certain circumstances. See 1976 Code Cong. & Ad. News 5908, 5912. Petitioners submit, in accordance with the view of the First Circuit that "[t]his specific mention of the possibility of interim fee awards to cushion the burden on plaintiffs seems to us to cut against any implication that the alternative approach of prejudgment interest was contemplated." *Rogers*, 821 F.2d at 27.

The First Circuit concluded its analysis of the Eleventh Amendment issues by stating:

> Yet where, as here, neither the statutory language nor the legislative history gives any basis for an inference that Congress actually intended to remove the State's Eleventh Amendment immunity from substantial sums of prejudgment interest on attorneys' fees awards - or indeed that Congress even considered the question of prejudgment interest on such awards - we think there is enough vitality in the Amendment to resist the inference.

In conclusion, the Eighth Circuit has interpreted this Court's holding in *Library of Congress v. Shaw* in, we submit, an incorrect way, and in a manner completely inconsistent with the First Circuit's interpretation of this decision in *Shaw*.[3] Petitioners respectfully request the Court to grant a writ of certiorari and resolve this conflict between the circuits.

B. The Eighth Circuit's Refusal to Require the Kansas City, Missouri School District, a Co-Constitutional Violator, to Pay a Proportion of Attorneys' Fees Commensurate With Its Liability on the Merits Is Contrary to a Previous Decision of This Court.

In *Kentucky v. Graham*, this Court indicated that "liability on the merits and responsibility for the fees go hand in hand." 473 U.S. 159, 165. The Court stated that the "logical place to look for relief is to the losing party—the party legally responsible for relief on the merits." *Id.* at 164.

In this litigation the Court of Appeals required the Kansas City, Missouri School District to pay 50% of the costs of remedying the constitutional violation underlying this litigation. See 838 F.2d at 267, Pet.App. at 19; *see also Jenkins*, 807 F.2d at 684-86. Notwithstanding the pronouncements of substantive law regarding apportionment contained in *Kentucky v. Graham, supra*, both the District Court and the Court of Appeals completely absolved KCMSD from liability for any part of the attorneys' fees

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3. The Eighth Circuit's alternative rationale, permitting compensation for delay to be considered as a factor in adjusting the reasonable hourly rate or the lodestar is also impermissible. That would be the type of end-run around the Eleventh Amendment which this Court rejected in *Edelman v. Jordan*, 415 U.S. 651 (1974).

and expenses, apparently because KCMSD cooperated with the plaintiffs. Petitioners respectfully submit this was error.

The logical extension of *Kentucky v. Graham*, is that liability on the merits and liability for attorneys' fees must be reasonably commensurate. It would be one thing if one of the co-constitutional violators was simply unable to pay its share of the attorneys' fees under 42 U.S.C. § 1988. But no evidence was produced below that would suggest KCMSD was unable to pay its share of attorneys' fees, particularly in light of the fact that the District Court judicially imposed a property tax increase and a Missouri State Income Tax surcharge on the residents of the District in order for the District to pay its share of remedying the constitutional violation.

While exact apportionment may not be mandated, to completely absolve one liable co-defendant of any liability for fees is inconsistent with this Court's holding in *Kentucky v. Graham*. Any discretion a district court may have in this area is limited by *Kentucky v. Graham*.

C. The Court Below Failed to Apply Previous Decisions of This Court by Failing to Reduce Expenses Incurred by the Plaintiffs in the Same Proportion As the Attorneys' Fees Were Reduced.

Plaintiffs sought all of their costs and expenses incurred throughout this litigation, even those spent against the prevailing defendants. The District Court granted them every item of expenses requested, to the penny, and the Court of Appeals affirmed. Petitioners respectfully submit that the failure to make the reductions required by *Hensley v. Eckerhart*, 461 U.S. 424 (1983), was error.

Hensley mandates that hours spent on unsuccessful claims in civil rights litigation must be excluded when making an attorneys' fees award. It follows necessarily that expenses incurred on unsuccessful claims must also be excluded when parties seek to shift the liability for those expenses to other parties. The court in *Vaughns v. Board of Education of Prince Georges County*, 598 F.Supp. 1262 (D.Md. 1984), *aff'd*, 770 F.2d 1246 (4th Cir. 1985) did precisely that. Otherwise the principles expressed in *Hensley* would be frustrated, and losing plaintiffs would be encouraged to play fast and loose with their expense monies, because they would know that all of these would be reimbursed even if they failed to prevail on some issues, and *Hensley* reductions were made on the fees.

Petitioners request this Court to review the judgment of the Court of Appeals in this regard.

D. The Opinion of the Eighth Circuit That Law Clerks and Paralegal Fees Should Be Awarded at Market Rates Rather Than Actual Costs Even Though the Law Clerks and Paralegals Were Hired Exclusively for the Litigation in Question Is in Conflict With a Decision of the First Circuit.

In the order from which review is sought, the Eighth Circuit stated, without adopting an ironclad rule, that it believed that market rates should govern in awarding law clerks and paralegal fees under 42 U.S.C. § 1988. Pet.App. at 15-16.[4]

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4. An award of $40 per hour for paralegal fees could not be justified unless they were to be awarded at market rates. The evidence developed below did not show that paralegals were paid anywhere near $40 an hour, which would be the equivalent of a yearly salary of $83,200 assuming a 40 hour work week. In fact the evidence below showed paralegals were paid approximately $8 per hour.

The evidence established through the pleadings and the hearing on the attorneys' fees issue showed that most of the law clerks and paralegals employed by the plaintiffs were hired specifically for the litigation at issue. No claim was made that the paralegals did work traditionally done by attorneys. The State argued below that these law clerks and paralegals should be compensated in the same way as expenses are, i.e., at out-of-pocket rates. After all, 42 U.S.C. § 1988 only authorizes the shifting of attorneys' fees to a losing party (along with the built-in profit in that fee), not market rates for law clerks and paralegals, along with another built-in profit factor.

The Eighth Circuit's decision on this issue is directly contrary to the decision of the First Circuit in *Lamphere v. Brown University*, 610 F.2d 46, 48 (1st Cir. 1979). In *Lamphere* the First Circuit held that when paralegals were hired specifically for the purposes of a certain litigation their salaries were recoverable at the rate of the *actual cost* to the employer, not as a separate billing. It is also contrary to the Sixth Circuit's reimbursing only paralegal *expenses* in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979) (court grouped photocopying, paralegal expenses, and travel and telephone costs together as items recoverable as reasonable *out-of-pocket* expenses).[5]

Petitioners submit that the views of the First and Sixth Circuits are more consistent with the statutory purpose of § 1988. The statute was intended to shift

5. In *Stewart v. Rhodes*, 656 F.2d 1216 (6th Cir. 1981), the Sixth Circuit upheld, without significant discussion under an abuse of discretion standard, an award of seemingly market-type rates for paralegal services.

attorneys' fees, with the built-in profit margin in the hourly rate to the losing party in certain civil rights litigation. Certainly shifting other out-of-pocket expenses such as photocopying, telephone costs and law clerk and paralegal expenses to the losing party is not inconsistent with the provision of attorney services. But § 1988 simply does not authorize the shifting of market rates for law clerks and paralegals (which can be as high as $50 or $60 per hour) to the losing party. If market rates for law clerks and paralegals are to be shifted, that determination is for Congress and not the courts to make.

We further note this Court recently granted review in a case raising a very similar issue. See *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987), *review granted*, No. 87-1485, 56 U.S.L.W. 3873 (6/28/88).

Petitioners respectfully submit that the conflict between federal circuit courts of appeal on this issue warrants resolution by this Court.[6]

6. In addition, the State notes the confusion between lower courts on this issue. Some courts consider paralegal services a part of normal office overhead and completely deny separate reimbursement. *See, e.g., Grendel's Den, Inc. v. Larkin*, 582 F.Supp. 1220, 1229 (D.Mass. 1984), *modified on other grounds*, 749 F.2d 945 (1st Cir. 1984); *Roe v. City of Chicago*, 586 F.Supp. 513, 516 (N.D.Ill. 1984); *Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 495, 502 (D.N.Dak. 1982). Other courts reimburse the actual costs of such services like *Lamphere, supra*, subject, of course to the *Hensley* reduction for partial success. See, e.g., *Greenspan v. Automobile Club of Michigan*, 536 F.Supp. 411, 415 (E.D.Mich. 1982) (to pay fair market value for paralegal services goes far beyond an award of costs); *Chapman v. Pacific Telephone and Telegraph Co.*, 456 F.Supp. 77, 82-83 (N.D.Calif. 1978) (reimbursement limited to actual or reimbursable cost of paralegal services); *Ross v. Saltmarsh*, 521 F.Supp. 753 (S.D.N.Y. 1981), *aff'd*, 688 F.2d 816 (2nd Cir. 1982) (district court limited reimbursement to actual wages for paraprofessional assistance). Other courts have reimbursed at market rates. *See, e.g., Ramos v. Lamm*, 713 F.2d 546, 558-89 (10th Cir. 1983); *Zeffiro v. First Pennsylvania Bank*, 574 F.Supp. 443, 449 (E.D.Pa. 1983).

E. The Eighth Circuit's Refusal to Reduce the Fees and Expenses Awarded to Plaintiffs Is Contrary to a Previous Decision of This Court.

This case began in 1977, filed originally by the KCMSD and four children of school board members. The original defendants included State of Missouri defendants, State of Kansas defendants, suburban Kansas School Districts, suburban Missouri School Districts (SSD), and three federal agencies. In 1978, the Kansas defendants were dismissed and KCMSD realigned as a defendant. In May, 1979, an Amended Complaint was filed against KCMSD, the federal defendants, the State of Missouri defendants and 12 suburban school districts.

The Court of Appeals' decision on the liability issues emphasized that the amended complaint made "two distinct allegations". 807 F.2d at 661. Plaintiffs asserted an *inter*district violation committed by the SSD's, the State and Federal defendants. Plaintiffs also asserted an *intra*district violation within KCMSD, committed by KCMSD and the State defendants. *Id.*

After 64 trial days presenting the plaintiffs' case, the District Court dismissed the SSD's and further found that none of the alleged discriminatory actions committed by the State or the Federal defendants had caused any significant current interdistrict effects. The District Court thus found in favor of all the defendants on plaintiffs' interdistrict liability claims.

After hearing additional evidence, the Court found in favor of the remaining Federal defendant, but held the State and KCMSD liable for racial segregation of students within KCMSD. The Court of Appeals' en banc decision affirmed the District Court's decision denying inter-

district relief with certain modifications to the intradistrict remedy and also ordered that KCMSD and the State share equal liability for the cost of the remedy. Plaintiffs' Petition for Certiorari from the Court of Appeals' en banc decision, No. 86-1717, filed April 24, 1987, strongly reveals that the primary focus of this litigation was *inter*district relief. The very first line of the Statement of Facts is "[t]his is an interdistrict school desegregation case." Plaintiffs' Petition for Certiorari, No. 86-1717, p. 3.

Yet, out of a total of approximately 45,000 hours work, plaintiffs only excluded about 7,300 hours claiming this was services expended on unsuccessful claims against the prevailing defendants and that the remaining time was spent on their successful claims or was so closely interrelated with their successful claims that it could not be separated.

The Court of Appeals was clearly troubled by the District Court's acceptance of the plaintiffs' voluntary reductions. The Court noted that they "might not have arrived at the same result as the District Court." The panel nevertheless affirmed the District Court order as not an abuse of discretion. The petitioners seek certiorari on this issue in order to clarify the continuing validity of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) as it relates to percentage reductions for partial success.

The minimal reductions in this case are clearly insufficient and an obvious abuse of discretion when one compares plaintiffs' limited success with the scope of the litigation as a whole. The goal of the plaintiffs was mandatory interdistrict relief, and this goal was simply not achieved.

While the State acknowledges that district courts must have some discretion in this matter, reimbursement of 85% of the hours worked in this case is clearly an abuse of discretion. It is evident that appellate courts need additional guidance from this Court concerning the proper review of attorney fee awards. The Appellate Court's decision not to modify the District Court's percentage reduction despite its disagreement is inconsistent with this Court's frequent admonishment that attorneys' fees issues should not result in a second major litigation. If satisfactory review, based on clearly established principles, cannot be obtained in an appellate court, then the parties are left with no choice but to turn fee applications into major litigation before the District Court.

CONCLUSION

For the reasons given, petitioners respectfully request this Court to grant a writ of certiorari.

Respectfully submitted,

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